Supreme Court, U.S.
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No. 84-1767

In The
Supreme Court of the United States
October Term, 1984

—o—

IN THE MATTER OF THE MARRIAGE OF
JOSEPH J. KONZEN,

Petitioner,

and

GERALDINE H. KONZEN,

Respondent.

—o—

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
to the
Supreme Court of the State of Washington

—o—

ROBERT M. SIFFERMAN
RICHARD C. CARRITHERS LAW OFFICES
1600 148th Avenue SE
Bellevue, Washington 98007
(206) 747-9252

Counsel of Record

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RESPONSE TO QUESTIONS PRESENTED FOR REVIEW

ISSUE NO. I

The first issue should be phrased:

> Do the provisions of the Uniformed Services Former Spouses' Protection Act (USFSPA) contained in 10 U.S.C. § 1408 prohibit a state court, in a dissolution of marriage proceeding, from awarding a portion of a service member's military retirement pay to the member's spouse when the marriage of the parties was subsequent to the member's retirement from the military service?

ISSUE NO. II

The Petitioner has failed to show a conflict between the express terms of the Uniformed Services Former Spouses' Protection Act and the State of Washington's policy that all property of the parties in a dissolution of marriage proceeding is before the state courts and may be divided in a just and equitable manner between the parties. The Petitioner has failed to show how the State of Washington policy sufficiently injures any objective of Federal policy in the USFSPA.

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OTHER AUTHORITIES:

10 U.S.C. § 1408	3, 5
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GROUNDS FOR JURISDICTION

Petitioner has failed to give a concise statement of the ground on which the jurisdiction of this Court is invoked. Petitioner has not called the constitutionality of any statute into question and therefore the requirements of 28 U.S.C. § 1257 have not been met.

COUNTER STATEMENT OF THE CASE

The parties met and began a relationship in September, 1964, prior to the Petitioner's retirement in June, 1967 from the U. S. Navy. After continuing their relationship for nearly six (6) years, the parties were married on June 26, 1970.

The Respondent has not graduated from high school. She is a recovering alcoholic. She has worked occasionally as a waitress and a retail clerk.

The Petitioner holds an undergraduate degree and a master's degree. He also worked as a manager for a golf and country club until just prior to the trial in this case. The Petitioner has a substantially and disproportionately greater earning capacity than the Respondent. At the time of trial, Petitioner's net income was approximately $1,500.00 per month, while the Respondent was unemployed.

The parties had three major assets:

(1) The Petitioner's military pension which was found to have a present value of $167,870.00 with monthly payments of $1,409.37.

(2) A vendor's interest in the sales contract of a restaurant, with a balance due of $52,900.00 and payments of $600.00 per month.

(3) The family residence with a gross value of $119,100.00, and a mortgage obligation of $53,650.00, leaving a net equity of $65,450.00.

The trial court found that the Respondent had living expenses of $1,000.00 per month.

The trial court found that the military pension was the separate property of the Petitioner and that the other

assets were community property under the laws of the State of Washington. The trial court granted a decree of dissolution of the marriage and divided the community property by awarding $60,860.00 worth of assets to the Respondent and $76,399.00, including the equity in the family home, to the Petitioner.

Included as part of the assets awarded to the Respondent was the restaurant sales contract. This would bring her $600.00 per month. The court awarded her thirty percent (30%) of the Petitioner's military pension as an award of property in the nature of permanent, non-modifiable alimony so that she would have the liquid assets to meet her monthly living expenses. Since the time of trial, the vendor's contract has become in arrears, and the Respondent has been forced to bring suit on the note. One of the makers has since filed for bankruptcy.

In the dissolution of marriage, the Petitioner was awarded the family home and the remaining seventy percent (70%) of the pension. The pension had a present value at the time of trial of $117,509.00. The Petitioner thus received approximately $1,000.00 per month from the pension.

The Petitioner appealed to the Washington State Court of Appeals, arguing that the trial court had abused its discretion in dividing the property. During the pendency of that appeal, this court decided *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981). Congress then enacted the Uniformed Services Former Spouses' Protection Act [Public Law No. 97-252, § 101, et seq., 96 Stat. 730 (1982), Codified at 10 U.S.C. § 1408]. The effective date of the Act was February 1, 1983, the date that oral argument was held before the State Court of Appeals.

The State Court of Appeals affirmed the trial court's decision with the modification that payments to the Respondent/wife would end on her death and not become part of her estate if she died before the Petitioner. The Washington State Supreme Court affirmed.

ARGUMENT

I.

The Provisions Of The Uniformed Services Former Spouses' Protection Act Allow A State Court To Treat Military Retired Pay As Property And Dispose Of It In A Marriage Dissolution In Accordance With The State Law.

The Uniformed Services Former Spouses' Protection Act removes the Federal preemption that this Court had found to exist in *McCarty v. McCarty,* 453 U.S. 210, 101 S. Ct. 2728 (1981). The Act returns to the states the right to treat military retired pay as property in a dissolution action. The primary purpose of the Act was to remove the effect of *McCarty* and return the courts to the laws effective the day before *McCarty* was handed down.

Paragraph (c)(1) of the Act provides:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

Spouse or former spouse is defined at (a)(6) as follows:

> Spouse or former spouse means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

The Respondent is a spouse as defined in the Act. The limitations on the state court's treatment of retired pay as property are contained in (c)(2)-(4). These provide:

> (2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.
>
> (3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.
>
> (4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

There is no restriction on the state courts' power to treat the retired pay as property as argued by Petitioner. There is no requirement that the parties be married ten (10) years during the member's years in the service. The ten (10) year provision only affects the enforcement mechanisms set up by Congress in §1408(d). This part of the act refers to payments by the government directly to the spouse or former spouse of the retired member upon service of a court order to that effect.

The distinction between the power of the state courts to treat the retired pay as property and the enforcement mechanisms set up under the Act for direct payments from the government is clear. The ten (10) year requirement only applies to the latter.

Petitioner argues for a different interpretation. The legislative history as quoted in the Washington State Court of Appeals decision and the Washington State Supreme Court decision shows the fallacy of Petitioner's argument. Congress intended to return the power to the states to treat military retired pay as property and divide it in accordance with the law of the appropriate jurisdiction. The result in this case from the State of Washington is consistent with the Act and congressional policy as set forth in the legislative history. Congress specifically considered whether there should be a five, ten or fifteen year requirement on the state courts' power, but decided against such a limitation. 1982 U.S. Code Cong. & Admin. News 1570, 1572.

The statute followed by the Washington courts in disposing of the property of the spouses is consistent with the considerations brought to the attention of Congress in their deliberations on this Act. RCW 26.09.080 provides:

> In a proceeding for dissolution of the marriage, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equit-

able after considering all relevant factors including, but not limited to:

(1) The nature and extent of the community property;

(2) The nature and extent of the separate property;

(3) The duration of the marriage; and

(4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse having custody of any children.

This statute was enacted in 1973 and was similar to the previous statute that had been in effect in Washington. It was in effect at the time that Congress passed the Uniformed Services Former Spouses' Protection Act.

Most state courts consider the same factors as are considered under Washington State law. As stated in the legislative history, found in 1982 U.S. Code Cong. & Admin. News at page 1605:

> These factors afford the domestic courts and the parties involved the opportunity to assess all the unique circumstances in each case without undue limitation. The duration of marriage should only be one of a number of factors applied in deciding any entitlement to a property interest in retired pay; it should not necessarily be the determining one. The committee believes that the function of weighing all these factors in effecting equitable distribution of marital assets is best preserved for the expertise of the courts involved.

The federal Act does not preclude the State of Washington from dividing the separate military pension of the Petitioner.

II.

The USFSPA Allows State Courts To Treat Military Retired Pay As Property And Reverses The McCarty Holding That Military Retired Pay Is A Personal Entitlement Of The Retired Service Member.

The Uniformed Services Former Spouses' Protection Act was designed to restore the law to what it was prior to this court's decision in *McCarty,* supra. The Act authorizes the state courts to once again treat retired pay as property in accordance with the law of the jurisdiction involved.

Since the Act in this instance was made retroactive to the day before the *McCarty* decision, state courts are allowed to once again apply the laws that were in existence on that date. The U. S. Supreme Court's holding in *McCarty* that military retired pay was a personal entitlement to the retired service member is no longer in effect.

Prior to *McCarty,* Washington courts treated military pay as property. *Wilder v. Wilder,* 85 Wn.2d 364; 534 P.2d 1355 (1975). This once again is allowed under the Act.

Even while the *McCarty* decision retained some vitality, state courts still had subject matter jurisdiction over the military retired pay. *McCarty,* 453 U.S. 210 at 230. An award of maintenance or alimony from the military retired pay would have been permissible under *McCarty.*

Petitioner has failed to satisfy the tests for federal preemption laid down by this Court in *Hisquierdo v. Hisquierdo,* 439 U.S. 572 at 581, 99 S.Ct. 802 (1979). This Court stated in *Hisquierdo*:

On the rare occasion when state family law has come into conflict with the federal statute, this court has limited review under the supremacy clause to a determination whether Congress has "positively required by direct enactment" that state law be preempted. (Case citation omitted) A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the supremacy clause will demand that state law be overridden. (Case citation omitted).

Further, this Court held at p. 583:

The approach must be practical. The federal nature of the benefits does not by itself proscribe the entire field of state control . . . The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.

———o———

CONCLUSION

The Washington State Supreme Court decision is not in conflict with Federal law, but is consistent with the Uniformed Services Former Spouses' Protection Act.

The United States Supreme Court should either affirm the Washington Supreme Court decision on its merits or deny the petition for a writ of certiorari.

Respectfully submitted,

Robert M. Sifferman
Richard C. Carrithers Law Offices
1600 148th Avenue SE
Bellevue, Washington 98007
(206) 747-9252

Counsel of Record